APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 81-2153

Richard Dean Holtan,

Appellant,

vs.

Robert Parratt, Warden of Nebraska Penal and Correctional Complex,

Appellee.

Appeal from the United States District Court for the District of Nebraska

Submitted: March 11, 1982
Filed: July 16, 1982

Before HEANEY, BRIGHT and HENLEY,* Circuit Judges.

HENLEY, Senior Circuit Judge.

Richard Dean Holtan was convicted by a Nebraska trial court of first degree murder while in the commission of a crime, and of shooting with intent to kill, wound, or maim, and was sentenced to death by electrocution. His petition for a writ of habeas corpus was denied by the United States District Court, and this appeal followed.

Because we agree with the district court that Holtan was denied effective assistance of counsel when his attorney failed to act on Holtan's request to seek withdrawal

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*The Honorable J. Smith Henley assumed senior status on June 1, 1982.

of his plea of nolo contendere, and because we find that Holtan was materially prejudiced thereby, we vacate the judgment of the district court and remand with directions. Further, because our decision may render moot the remaining issues raised by Holtan,[1] we decline to decide those issues at this time.

Holtan's conviction arose out of a robbery of a bar in Omaha, Nebraska. The robber entered the bar and robbed the cash register of its contents. He then forced the bartender and two patrons into a restroom and, after the bartender had been forced to tie the hands of the patrons, shot and killed the bartender and wounded one of the patrons. Holtan, the prime suspect, was not apprehended until several months later, when he surrendered to authorities in Hawaii.

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[1]Those contentions raised by Holtan which will not now be considered by this court may be stated as follows:

(1) A psychiatric examination to determine his competency to stand trial should have been ordered;

(2) The refusal of the sentencing judges to consider character evidence presented on his behalf as a nonstatutory mitigating circumstance violated his eighth amendment rights under the standard set forth in *Lockett v. Ohio*, 438 U. S. 586 (1978);

(3) The death sentence, imposed with no participation by a jury, violated his sixth, eighth and fourteenth amendment rights;

(4) Sections 29-2520 and 2521, R. R. S. Neb., violate his rights to equal protection and to due process of law, because they do not provide adequate criteria for the invocation of a three-judge panel and do not specify the procedure to be followed when such a panel is convened; and

(5) Nebraska's method of execution—electrocution— is cruel and unusual punishment in violation of the eighth and fourteenth amendments.

Holtan pled no contest, and was sentenced by a three-judge panel to death on the murder charge, and to imprisonment for a term of fifteen to forty-five years on the other charge. During this time, he was represented by Mr. Carey of the Douglas County, Nebraska Public Defender's Office. Holtan's conviction and sentences were affirmed by the Supreme Court of Nebraska in *State v. Holtan*, 250 N.W. 2d 876 (Neb. 1977), *cert. denied sub nom. Holtan v. Nebraska*, 434 U.S. 912 (1977). A later challenge to his conviction under the Nebraska Post Conviction Act was denied by the District Court of Douglas County, Nebraska, and that decision was affirmed by the Supreme Court of Nebraska. *State v. Holtan*, 287 N.W. 2d 671 (Neb. 1980).

In the United States District Court, and on appeal, Holtan contends that he received ineffective assistance of counsel in the following ways:

(a) by the failure of his counsel to subpoena witnesses who would have presented mitigating factors at his sentencing hearing and by informing Holtan that the State was financially unable to provide the assistance necessary to secure the presence of those witnesses;

(b) by the failure of counsel to discuss trial strategy with Holtan at any time and by failing to advise him that the only eyewitnesses to the charge against him had given widely varying descriptions of the assailant and that there was no physical evidence to connect him with the crime charged;

(c) by the failure of counsel to investigate the case adequately, either through the taking of depositions, interviewing of witnesses, or reading the police reports in their entirety;

(d) by counsel's advising Holtan that a no contest plea would be beneficial in that it would prevent the appearance of the surviving female victim, who defense counsel felt would evoke hostility toward the petitioner, and in failing to obtain an agreement with the prosecuting attorney that the victim would not appear if a plea were entered;

(e) by the failure of counsel to advise the court that Holtan wished to withdraw his plea of no contest to the charge of first degree murder after he had been advised by counsel that the penalty which the court probably would impose was the sentence of death; and

(f) by the failure of counsel to investigate adequately the petitioner's mental capacity both at the time of the commission of the crime and at the time of the plea, when counsel knew the petitioner had a history of mental disorders.

Subissue (a) involves Carey's failure to subpoena out-of-state psychiatrists and character witnesses who allegedly would have presented mitigating factors at the sentencing hearing. The district court, in resolving this issue, stated that "[t]here appears to be no breach of an essential duty to interview these witnesses, because they did not have material knowledge." The district court also observed that "[e]ven if the character witnesses had material knowledge and Carey breached an essential duty by failing to subpoena them, Holtan has not shown the requisite prejudice." After having carefully examined the record, we hold that the district court's findings are fully supported by the record and are not clearly erroneous.

The district court also resolved subissues (b), (c) and (f) by making factual findings that Carey had discussed trial strategy and the potential testimony of the

witnesses with Holtan, that Carey's investigations of potential witnesses and of other materials had been adequate, and that adequate investigations into Holtan's mental capacity had been made by Carey. Again, we hold that these findings are not clearly erroneous. Accordingly, we turn to subissues (d) and (e).

In its discussion of subissue (e), the district court found:

> Subissue 'e' of the claim of ineffectiveness—Carey's alleged failure to act on Holtan's request to withdraw the no contest plea—is . . . the subject of some dispute as to exhaustion. . . . [I]t is not the subject of a deliberate bypass and it will be treated as exhausted, due to the inability to raise it further in a state proceeding.
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> Holtan contends that he telephoned Carey at his home about five days before sentencing to request withdrawal of the no contest plea. Carey responded that he would see Holtan in a few days. Despite Carey's inaction, Holtan did not mention the request at the time of the sentencing, because he felt that it was too late to request withdrawal and that it was not his place to do so. Carey has no recollection of the telephone call. The evidence fairly shows that the request was made and not acted upon.
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> A reasonably competent attorney would likely pursue such a request and attempt to have the plea withdrawn; Carey has breached an essential duty. Holtan has not shown, however, that his defense was substantially prejudiced.

The district court's decision to treat this issue as exhausted "due to the inability to raise it further in a state proceeding" has been somewhat troublesome to this court in light of the Supreme Court's recent decision in *Engle v. Isaac*, 102 S. Ct. 1558 (1982), that "any prisoner bring-

ing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Id.* at 1572. *See United States v. Frady*, 102 S. Ct. 1584, 1594 (1982); *Tippett v. Wyrick*, No. 81-2383 (8th Cir. June 14, 1982); 28 U. S. C. § 2254(b).

The exhaustion controversy here stems from petitioner's failure to assign specifically his trial counsel's failure to request withdrawal of the plea as an issue in his appeal from the state district court's denial of his petition for post-conviction relief, for, under Nebraska law, consideration of an issue on appeal will be limited to errors specifically assigned and discussed except that the Supreme Court of Nebraska may, at its option, note a plain error not assigned. *E.g., State v. Redden*, 149 N. W. 2d 98 (Neb. 1967). However, we note that the Nebraska Supreme Court will consider an "argued error, even though the same was not assigned," where the defendant has been charged with a capital crime and where the death sentence has been imposed. *State v. Peery*, 261 N. W. 2d 95, 97 (Neb. 1977).

In the case at bar, it is clear that this issue was raised before the state district court in Holtan's request for state post-conviction relief, and it is also clear that this issue was raised before the Supreme Court of Nebraska during Holtan's appeal from the state district court's denial of post-conviction relief. Brief for Appellant at 12; *State v. Holtan*, 287 N. W. 2d 671 (Neb. 1980). Consequently, we hold that Holtan adequately raised this issue before the Nebraska courts, notwithstanding his failure to specify it as error in that appeal, and notwithstanding the Supreme Court of Nebraska's failure to address the issue

in its decision. *State v. Peery*, 261 N.W. 2d at 97. It follows that there has been no procedural default with regard to this issue, that *Engle v. Isaac* is therefore not applicable, and the issue is properly before us.[1]

The State has conceded on appeal and the district court found that the request for withdrawal of plea was made and not acted upon. We find substantial evidence in the record to support this conclusion and we also agree with the district court that a reasonably competent attorney would likely pursue such a request. However, we are unable to agree with the district court that prejudice has not been shown.

This court has consistently held that a petitioner must show that his attorney has failed to exercise the customary skills and dilegence that a reasonably competent attorney would exercise in the circumstances. In the event that such failure is shown, however, if petitioner is to prevail on the issue of ineffective assistance of counsel he must also show that he was materially prejudiced thereby in the defense of his case. *See, e.g., Comer v. Parratt*, No. 81-2108 (8th Cir. April 2, 1982); *DuPree v. United States*, 606 F. 2d 829, 830-31 (8th Cir. 1979); *Morrow v. Parratt*, 574 F. 2d 411, 412-13 (8th Cir. 1978; *United States v. Easter*, 539 F. 2d 663, 665-66 (8th Cir. 1976).

The district court found that Holtan had not shown prejudice because in Nebraska, "[a] defendant does not have an absolute right to have a guilty plea withdrawn upon request. . . . The petitioner has made no showing

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[1]We make similar findings with regard to subissue (d).

that his attempt at withdrawal would have, should have, or might have been accepted by the district court." *Holtan v. Parratt*, No. CV81-L-07 (D. Neb., filed Oct. 10, 1981). While we agree that Holtan's right to withdrawal of his plea of nolo contendere may not be absolute, and that a no contest plea is to be treated the same as a guilty plea, *see State v. Kluge*, 251 N.W. 2d 737, 739 (Neb. 1977), and cases cited therein, we nevertheless thank the grounds for withdrawal urged here are not without substantial merit. Thus, we extend our inquiry into Nebraska case law.

In *State v. Evans*, 234 N.W. 2d 199 (Neb. 1975), the Supreme Court of Nebraska adopted a standard governing withdrawals of guilty pleas that had the effect of harmonizing what may have been divergent Nebraska cases in this area. *Compare State v. Daniels*, 211 N.W. 2d 127, 129 (Neb. 1973), *with State v. Freeman*, 226 N.W. 2d 351, 353 (Neb. 1975), *and State v. Williams*, 213 N.W. 2d 727, 728 (Neb. 1974). The court in *Evans* stated:

> As defendant's counsel suggests, in *State v. Turner* (1971), 186 Neb. 424, 183 N.W. 2d 763, we enunciated the following rule concerning pleas of guilty: "• • • the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of such pleas." We have consistently adhered to this position and have set aside pleas where the ABA Standards were not followed. . . .

234 N.W. 2d at 201.[3] The standard adopted in *Evans*

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[3]The ABA Standards adopted by the Supreme Court of Nebraska are as follows:

(Continued on next page)

was later expressly approved in *State v. Kluge*, 251 N. W. 2d 737 (Neb. 1977), and in *State v. Hill*, 285 N. W. 2d 229 (Neb. 1979).

(Continued from previous page)

(a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.

(ii) Withdraw is necessary to correct a manifest injustice whenever the defendant proves that:

(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or

(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.

(iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

State v. Evans, 234 N. W. 2d at 201.

A careful reading of these and other recent Nebraska cases in this area, moreover, indicates that other considerations may also have some bearing on the trial court's decision to permit or deny withdrawal. The net effect of these cases may be summarized as follows:

I. The court *should* allow the defendant to withdraw his plea of nolo contendere or guilty when withdrawal is necessary to correct a manifest injustice, *State v. Hill,* 285 N.W. 2d at 232; *State v. Kluge,* 251 N.W. 2d at 740; *State v. Evans,* 234 N.W. 2d at 201; *State v. Freeman,* 226 N.W. 2d at 353; *State v. Johnson,* 187 N.W. 2d 99, 101 (Neb. 1977), and where the grounds for withdrawal are established by clear and convincing evidence. *State v. Hill,* 285 N.W. 2d at 232; *State v. Kluge,* 251 N.W. 2d at 740.

Manifest injustice is shown where these is clear and convincing evidence that the plea was not knowingly, intelligently or voluntarily made. *State v. Hill,* 285 N.W. 2d at 232; *State v. Kluge,* 251 N.W. 2d at 740; *State v. Johnson,* 187 N.W. 2d at 101; *State v. Eutzy,* 172 N.W. 2d 94, 95-96 (Neb. 1969). In this regard, the defendant must prove fraud, mistake, or other improper means used in the procurement of the plea. *State v. Kluge,* 251 N.W. 2d at 740; *State v. Evans,* 234 N.W. 2d at 201; *State v. Williams,* 213 N.W. 2d at 728.

Manifest injustice is also shown where a defendant proves that he was denied effective assistance of counsel, where the plea was not entered into or ratified by the defendant, or where the prosecuting attorney opposes or fails to seek concessions as promised in a plea agreement. *State v. Evans,* 234 N.W. 2d at 201. In addition, an

"inadvisable" plea, when combined with the trial court's failure to appoint an attorney upon request, will also render it necessary to set aside a sentence. *State v. Journey*, 184 N. W. 2d at 617. However, a showing of manifest injustice cannot be made merely by showing that the defendant would not have entered into a plea bargaining agreement had he known the judge would not accept the sentence recommendation. *State v. Evans*, 234 N. W. 2d at 202; *State v. Eutzy*, 172 N. W. 2d at 95-96.

II. The court in its discretion *may for any fair and just reason* allow the defendant to withdraw his plea, unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. *State v. Hill*, 285 N. W. 2d at 232; *State v. Kluge*, 251 N. W. 2d at 739; *State v. Daniels*, 211 N. W. 2d at 129. *See State v. Journey*, 184 N. W. 2d at 617.[4]

Some fair and just reasons would appear to include entry of the plea by mistake; under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; a plea made involuntarily for any reason; or a plea made inadvisably, if any reasonable ground is offered for going to the jury. *See State v. Journey*, 184 N. W. 2d at 617.

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[4]However, where the plea has been entered into pursuant to the terms of a plea bargaining agreement, a defendant will *not* be permitted to withdraw his plea absent a showing of manifest injustice, *State v. Alegria*, 255 N. W. 2d 419, 421 (Neb. 1977), or where such an attempt, if given effect, would result in an abuse of the plea bargaining process. *State v. Johnson*, 187 N. W. 2d at 101.

III. In the context of plea changes, a defendant must, at a minimum, be informed of and understand that entry of a plea of guilty or nolo contendere will operate to waive his right to a trial by jury, *State v. Tweedy*, 309 N.W. 2d 94, 98 (Neb. 1981); *State v. Hill*, 285 N.W. 2d at 233, his right to confront witnesses, and his privilege against self-incrimination, *State v. Tweedy*, 309 N.W. 2d at 98; *State v. Hill*, 285 N.W. 2d at 234-35, and the record must reflect this. *State v. Tweedy*, 309 N.W. 2d at 98.

The information given the defendant by the court need not be given in a strict, ritualistic litany or in an item-by-item review of constitutional rights. *State v. Hill*, 285 N.W. 2d at 234-35; *State v. Fowler*, 271 N.W. 2d 341 (Neb. 1978). Further, a guilty plea may not be withdrawn as a matter of right solely because the defendant, in the face of a specific question from the court, chose to withhold facts from that court which, if believed, might have prevented the court from accepting it. *State v. Miller*, 275 N.W. 2d 614, 616 (Neb. 1979).[5]

Against this backdrop, we turn to the facts at bar to assess whether Holtan has made a sufficient showing of prejudice.

The federal district court found, in connection with its resolution of subissue (d), that Holtan's nolo con-

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[5]At this point, we deem it well to observe that we have made a summary of the Nebraska cases solely for the purpose of determining whether Holtan has made a sufficient showing of prejudice resulting from Carey's failure to request withdrawal. We do not address the policy or validity of any of the Nebraska decisions, as such is not necessary for present purposes.

Indeed, it may be remembered that the summary of Nebraska law is our own, and the Nebraska courts, of course, are not bound by our interpretations of Nebraska state law.

tendere plea was not entered into as a result of any ineffective assistance on Carey's part. Rather, Holtan was found to have *insisted* on entering the plea as a result of a mistaken impression on his part that by entering the plea he could avoid confronting certain prosecution witnesses and thus (hopefully) avoid the death penalty.[6] The State now concedes that this finding is an accurate reflection of the facts.

The Nebraska Supreme Court, in its affirmance of the state trial court's denial of post-conviction relief, stated that "the record simply does not show that the defendant was not aware of sufficient facts upon which he could make an intelligent decision with regard to entering his plea." *State v. Holtan,* 287 N.W. 2d at 675. Indeed, we observe that when Holtan entered his plea, the trial court entered into an extensive colloquy with the defendant, covering forty pages of transcript, and did a commendable job both of informing Holtan of the consequences of the plea and of satisfying itself that Holtan understood these consequences.

However, we also note that at no time during this colloquy did the parties or the court discuss the possibility that witnesses to the shooting could and would testify at the sentence hearing.[7] In addition, the Nebraska Supreme Court, in holding that Holtan's plea was knowing and intelligent, was addressing the issue of whether Holtan had been aware that one of the witnesses had

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[6]Although Carey attempted several times to reach a plea agreement with the prosecution, he was unable to do so.

[7]The sentence hearing followed the plea hearing by about a month.

difficulty identifying him, and not whether Holtan was fully aware that damaging testimony could be elicited at the sentence hearing.

This court nevertheless observes that although the plea was entered into under a mistaken impression on Holtan's part, and although the trial court did not uncover this mistake at the time the plea was entered, the mistake was not the result of ineffective assistance on the part of counsel, or of any misconduct on the part of the prosecution, and the trial court's investigation of the voluntariness of the plea was clearly adequate.[8] In these circumstances, we are unable to state that Holtan was entitled to withdraw his plea as a matter of right.[9]

Further, although the prosecution has conceded at argument that it would not be prejudiced by Holtan's withdrawing his plea, and although Holtan has, in our opinion, shown fair and just reasons which could influence the state trial court to allow withdrawal of the plea, the Nebraska law is nevertheless clear in these circumstances that a request for withdrawal is addressed to the sound discretion of the trial court. Consequently, we cannot conclude with certainty that Holtan would have been allowed to withdraw his plea if a request for such withdrawal had been timely made.

But we also observe that as a result of Carey's failure to act on Holtan's request for withdrawal, Holtan

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[8]Because no specific inquiry was made that would have elicited Holtan's mistaken belief, *State v. Miller*, 275 N. W. 2d 614 (Neb. 1979), is not applicable here.

[9]By this, we do not mean to say that the Nebraska courts could not find that he was entitled as a matter of right to withdraw his plea; we merely state that we are not certain that the Nebraska courts would, in fact, so hold.

was denied the opportunity even to *present* his request to the trial court. *Cf. Robinson v. Wyrick*, 635 F. 2d 757 (8th Cir. 1981) (failure to appeal). In addition, because of the dire consequences that would flow from the trial court's refusal to allow withdrawal, because, as the State concedes, no countervailing prejudice to the State will occur, and in light of Holtan's mistake as to the prosecution's ability to present adverse testimony at the sentencing hearing, the possibility that he would have been allowed to withdraw his plea is not insubstantial. In these circumstances, we hold that Holtan has made an adequate showing that he was prejudiced by Carey's failure to act on the request to withdraw the plea of nolo contendere.

This is not to say that prejudice always can be proved merely by showing that the petitioner has been denied a procedural device as a result of ineffective assistance of counsel. All we are saying is that where, as a result of ineffective assistance of counsel, a petitioner has been denied the opportunity to request withdrawal of his plea of guilty or nolo contendere, and where he has shown that there is a substantial probability that he would have succeeded in such a request, then an adequate showing of prejudice has been made.

We do not now direct issuance of the writ of habeas corpus nor do we either suggest or require vacation of Holtan's conviction. Rather, we vacate the judgment of the district court and remand for further proceedings.

If within a reasonable time to be fixed by the district court appellant shall by appropriate pleading request of the Nebraska courts leave to withdraw his plea of nolo

contendere, and if a Nebraska state court of competent jurisdiction entertains that pleading and stays execution pending its consideration of appellant's case, then the district court shall dismiss the habeas petition without prejudice. Should Nebraska decline to entertain appellant's case, the district court shall issue its writ of habeas corpus conditioned as justice may require.

Should appellant fail to seek state court leave to withdraw his plea within the time authorized by the district court, that court shall dismiss the habeas petition, and such dismissal shall be with prejudice as to all ineffective assistance issues raised before that court.

Further, because state court action on appellant's request may render moot the remaining issues raised in this appeal, we decline to decide those issues at this time.

Judgment vacated and cause remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD DEAN HOLTAN,

Petitioner,

vs.

ROBERT PARRATT, Warden of Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM

CV81-L-07

(Filed: October 19, 1981)

APPEARANCES: For petitioner, J. William Gallup
For respondent, J. Kirk Brown, Assistant Attorney General

URBOM, Chief Judge

The petitioner, Richard Dean Holtan, an inmate at the Nebraska State Penitentiary, has filed a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254, challenging his conviction for first degree murder while in the commission of a crime, under § 28-401, R. R. S. Neb. (Supp. 1973), and shooting with the intent to kill, wound, or maim, under § 28-410, R. R. S. Neb. (Cum. Supp. 1972). The petitioner pleaded no contest to both counts and was sentenced to death on the murder charge and to 15 to 45 years imprisonment on the second count. The convictions and sentences were affirmed by the Supreme Court of Nebraska in *State v. Holtan*, 197 Neb. 544, 250 N. W. 2d 876 (1977); the Supreme Court of the United States denied certiorari, *Holtan v. Nebraska*, 434 U. S. 912 (1977).

A subsequent challenge to the convictions under the Nebraska Post Conviction Act was denied by the District Court of Douglas County, Nebraska, and affirmed by the Supreme Court of Nebraska in *State v. Holtan,* 205 Neb. 314, 287 N. W. 2d 671 (1980).

The petitioner's conviction arises out of a robbery of the Dugout Bar in Omaha, Nebraska, on October 31, 1974. According to the evidence, Holtan entered the bar and robbed the cash register of its contents. He forced the bartender and two patrons into a restroom and after the bartender tied the hands of the patrons, Holtan shot and killed the bartender and wounded one of the patrons. Holtan was not apprehended until several months later, when he surrendered to authorities in Hawaii.

Holtan was represented by Lynn Carey of the Douglas County Public Defender's Office. A brief outline of the disputed facts surrounding that representation follows immediately; additional facts are developed in other portions of this memorandum.

The number of times Carey visited Holtan is uncertain. Holtan claims it was only five or six times; Carey is certain it was more, although he could make no estimate of the number. The amount of factual investigation done is also uncertain. Holtan alleges that Carey did not interview and depose witnesses; Carey testified that other members of the defender's staff interviewed some of the witnesses, although none was deposed. Carey made a trip to the State of Washington to interview certain psychiatrists who had in the past treated Holtan. There is also some disagreement as to whether Carey fully read the police reports concerning the case.

Holtan claims that Carey made certain untrue or misleading representations. First, Carey is alleged to have said that there was no money for subpoenaing out-of-state witnesses, although Carey recalls only that he mentioned a lack of funds for witnesses who would not offer material testimony. Second, Holtan claims that Carey falsely told him that a plea of no contest would prevent the survivor of the shooting from appearing at the sentencing hearing. Carey testified that the concern about the witness was primarily Holtan's, and that he was not told that the plea would prevent the witness from appearing.

Holtan contends that he telephoned Carey to request that his no contest plea be withdrawn. Holtan recounted several specifics about the time and date he placed the call to Carey; Carey could not remember receiving the call.

After the no contest plea, a three-judge panel was convened, pursuant to § 29-2520, R. R. S. Neb. (Supp. 1973), to determine the sentence on the murder conviction. Evidence was received at that hearing, including a report of an incident in the Douglas County jail that Holtan had saved a fellow prisoner's life when the prisoner attempted to commit suicide. The three-judge panel did not consider this evidence to constitute a mitigating factor.

The issues, as stated in the magistrate's order on pretrial conference, are:

I. Whether the petitioner received ineffective assistance of counsel,

   a. by the failure of petitioner's counsel to subpoena witnesses who would have presented mitigating factors at the petitioner's sentencing hearing and

by informing the petitioner that the state was financially unable to provide the financial assistance necessary to secure the presence of those witnesses;

b. by the failure of the petitioner's counsel to discuss trial strategy with the petitioner at any time and by failing to advise the petitioner that the only eyewitnesses to the charge against him had given widely varying descriptions of the assailant and that there was no physical evidence to connect him with the crime charged;

c. by the failure of petitioner's counsel to investigate the case adequately, either through the taking of depositions, interviewing of witnesses, or reading of the police reports in their entirety;

d. by the petitioner's counsel's advising the petitioner that a no contest plea would be beneficial in that it would eliminate the appearance in court of the surviving female victim, who defense counsel felt would create hostility toward the petitioner by the sentencing judges, and in failing to obtain an agreement with the prosecuting attorney that that woman would not appear if a plea were entered;

e. by the failure of the petitioner's counsel to advise the court that the petitioner wished to withdraw his plea of no contest to the charge of first degree murder after he had been advised by counsel that the penalty which the court probably would impose was the sentence of death; and

f. by the failure of petitioner's counsel to investigate adequately the petitioner's mental competency both at the time of the commission of the crime and at the time of the plea, when counsel knew the petitioner had a history of mental disorders;

II. Whether the three-judge panel which sentenced the petitioner to death refused to consider character evi-

dence offered by the petitioner at his sentencing hearing;

III. Whether the trial court failed to conduct on its own motion a psychiatric examination of the petitioner prior to accepting his no contest plea;

IV. Whether the statutes providing for the imposition of the death sentence are unconstitutional in that they fail to provide criteria for the invocation of a three-judge panel and fail to provide any criteria for the procedure to be followed in the event a three-judge panel is convened for sentencing purposes;

V. Whether the statutes providing for the imposition of the death sentence are unconstitutional in that they fail to provide for any jury input on the issue of what sentence could be imposed upon a defendant convicted of a capital crime; and

VI. Whether Nebraska's method of execution by electrocution is cruel and unusual.

I.

INEFFECTIVE ASSISTANCE OF COUNSEL

The first issue presents multifarious allegations of the inadequacy of counsel. While several issues are factual, others are judged under this circuit's test for ineffective assistance of counsel:

> ". . . First, the [petitioner] must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. . . . Secondly, the defendant must show that he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. . . ."
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> *Morrow v. Parratt*, 574 F. 2d 411, 412-413 (C. A. 8th Cir. 1978).

In applying the test, there is a presumption of effective assistance of counsel which is overcome when the petitioner proves:

> "... that (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense...."
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> *DuPree v. United States*, 606 F. 2d 829, 830-831 (C. A. 8th Cir. 1979).

Subissue "a" presents little factual dispute. Clearly, witnesses were not called from out-of-state to be present at the sentencing hearing. There are two versions, however, of a conversation about the lack of funds to bring these witnesses to Nebraska. Carey claims that he said only that there was a limitation of funds and that only witnesses with material knowledge could be brought in; Holtan claims that the statement was broader and encompassed all witnesses. The preponderance of the evidence supports Carey's version. It would be easy to misinterpret such a statement, as Holtan apparently has.

The focus becomes whether Carey owed Holtan an essential duty to subpoena all witnesses. In *Morrow v. Parratt*, supra, the court held that there was an essential duty to interview eyewitnesses; the implication is that the duty extends only to witnesses with material knowledge, not every possible witness, and consonant with this duty, or lack thereof, would be a duty to subpoena witnesses.

Carey went to the State of Washington to interview psychiatrists who had material knowledge about Holtan's mental state. He did not, however, interview other witnesses without material knowledge whom Holtan wanted to

call as character witnesses at his sentencing hearing. There appears to be no breach of an essential duty to interview these witnesses, because they did not have material knowledge. Therefore, if there were no duty to interview, there would be no duty to subpoena. The failure to subpoena the psychiatrists was a tactical decision. Carey felt the Washington psychiatrists would do more harm than good by eroding a psychiatric defense. It is not the province of this court to second-guess informed tactical judgments by counsel.

However, even if the character witnesses had material knowledge and Carey breached an essential duty by failing to subpoena them, Holtan has not shown the requisite prejudice.

Subissue "b" is resolved by a factual finding. Holtan contends that Carey never discussed trial strategy with him, citing particularly the failure to discuss the varying descriptions given by the eyewitnesses. Carey has no recollection of particular topics, but is certain that trial strategy was discussed. The record supports a conclusion that Carey informed Holtan about the witnesses he would confront. Holtan was aware of tactical problems inherent in confronting the survivor of the shooting. Carey believes that he discussed matters with Holtan on more than one occasion for at least an hour. The record seems to indicate that Holtan was apprised of the whole gamut of evidence he would face at trial. While the evidence is not wholly clear, a preponderance supports the conclusion that counsel discussed with Holtan the potential witnesses and their weaknesses. Because the underlying facts to this subissue have been found absent, the claim is without foundation.

Subissue "c" is likewise amenable to decision based on a resolution of the facts. Defense counsel has a duty to interview witnesses and generally make a pretrial investigation. *Ford v. Parratt*, 638 F. 2d 1115, 1118 (C. A. 8th Cir. 1981). The preponderance of the evidence in the record supports a conclusion that an adequate pretrial investigation was made. Carey did not personally do all the interviewing; another member of the Public Defender's Office, Ivory Griggs, interviewed one witness. In addition, the police reports contained interviews with the witnesses.

The claim that Carey failed to read the police reports is strongly contradicted by the record. Carey testified that he had read the entire set of reports. In addition, he was familiar with the lack of circumstantial evidence incriminating Holtan—a result of reading the reports. The above allegations are not supported by a preponderance of the evidence, rendering the claim without merit.

The failure to depose witnesses is not in dispute. This claim of ineffectiveness, however, fails to meet either precondition to refute the presumption of effective assistance of counsel. While counsel owes an essential duty to make a reasonable investigation, *McQueen v. Swenson*, 498 F. 2d 207, 217 (C. A. 8th Cir. 1974), that duty does not extend in all cases to deposing witnesses. It can be fairly said that there appears to have been a reasonable investigation in this case without deposing witnesses. The petitioner's claim also fails because there has been no showing of prejudice.

Subissue "d" was the subject of some dispute with respect to exhaustion. Although it appears that the claim

was never presented to the Supreme Court of Nebraska, it was not the result of a deliberate bypass and it is treated as exhausted, because of the further inability to present the claim in state court.

Holtan contends that he was told by Carey that the survivor of the shooting would not testify at the sentencing hearing if he pleaded no contest. Carey testified that it was Holtan's idea that he could avoid confronting the shooting victim in the sentencing hearing and he thereby *insisted* on pleading no contest. While misleading a defendant to force a no contest plea is improper, see *Ford v. Parratt*, supra, 638 F. 2d at 1118, the preponderance of the evidence is that there was no misleading. Holtan appears to have construed a discussion with Carey that he would confront the victim if the case proceeded to trial to mean that he would not have to confront her if he did not go to trial. Holtan's misconstruction of Carey's statement does not amount to the alleged affirmative statement by Carey. This subissue lacks factual basis and is decided adversely to the petitioner.

Subissue "e" of the claim of ineffectiveness—Carey's alleged failure to act on Holtan's request to withdraw the no contest plea—is also the subject of some dispute as to exhaustion. As with the previous claim, it is not the subject of a deliberate bypass and it will be treated as exhausted, due to the inability to raise it further in a state proceeding.

Holtan contends that he telephoned Carey at his home about five days before sentencing to request withdrawal of the no contest plea. Carey responded that he would see Holtan in a few days. Despite Carey's inaction, Holtan

did not mention the request at the time of sentencing, because he felt that it was too late to request withdrawal and that it was not his place to do so. Carey has no recollection of the telephone call. The evidence fairly shows that the request for withdrawal was made and not acted upon.

A reasonably competent attorney would likely pursue such a request and attempt to have the plea withdrawn; Carey has breached an essential duty. Holtan has not shown, however, that his defense was substantially prejudiced.

A defendant does not have an absolute right to have a guilty plea withdrawn upon request. See *Gunn v. Kuhlman*, 479 F. Supp. 338, 343 (U. S. D. C. S. D. N. Y. 1979); see, also, *United States v. Becklean*, 598 F. 2d 1122, 1125 (C. A. 8th Cir.), cert. denied, 444 U. S. 864 (1979). In Nebraska, a trial judge may not permit the withdrawal of a guilty plea that was knowingly, intelligently, and voluntarily made unless necessary to prevent manifest injustice. *State v. Miller*, 202 Neb. 443, 444, 275 N. W. 2d 614, 616 (1979). Because a no contest plea has the same effect as a guilty plea, there is no basis for a different standard. The petitioner has made no showing that his attempt at withdrawal would have, should have, or might have been accepted by the district court. Accordingly, he has failed to show prejudice and has not rebutted the presumption of competency.

The final subissue, "f"—investigation of mental capacity at the time of the crime—is not factually supported by the record. Carey had Holtan examined by local psychiatrists and he interviewed the psychiatrists who had treated Holtan in Washington. There appears to be a lack

of evidence justifying a defense of insanity under the M'Naughten Rule employed by the Supreme Court of Nebraska.

Because all of the issues of ineffective assistance of counsel have been decided adversely to the petitioner, the claim is denied.

II.

CHARACTER EVIDENCE

The issue as framed in the pretrial order does not state a constitutional issue per se—only a factual dispute. The three-judge sentencing panel received evidence concerning Holtan's character. This was the report of the incident of Holtan's saving a fellow inmate's life while at the Douglas County jail. Insofar as the panel received the evidence, it considered character evidence. The panel did not find the evidence to be a mitigating factor; in that vein, it could be said it did not consider character evidence. The better view—that taken by the Supreme Court of Nebraska—is that the reception of the evidence constituted consideration of the offered character evidence. See *State v. Holtan,* 205 Neb. at 319, 287 N. W. 2d at 674.

This issue statement may be an attempt to define as an issue whether § 29-2523(2), R. R. S. Neb., is unconstitutional because it does not allow character evidence as a mitgating factor. Such an issue would draw on *Lockett v. Ohio,* 438 U. S. 586 (1978), and *Bell v. Ohio,* 438 U. S. 637 (1978). In both of those cases the court was divided, leaving some doubt as to the issue of character evidence. Four justices joined in the conclusion that a death penalty statute must not *preclude* the consideration of character evidence, although they stopped short of requiring that char-

acter evidence be a separate mitigating factor. *Lockett v. Ohio*, 438 U.S. at 597-609, 642-643. Justice Rehnquist dissented from the reversal of the conviction, because he felt it was unnecessary to require evidentiary standards such as the receiving of character evidence under the Eighth Amendment. 438 U.S. at 634.

The opinions of those five justices present a strand of thought suggesting that Nebraska's method of considering mitigating circumstances is constitutional. Nebraska's statute would be upheld by the plurality, because it does not *preclude* the reception of character evidence. See *State v. Holtan*, 205 Neb. 314, 318-319, 287 N. W. 2d 671, 674 (1980). Justice Rehnquist's opinion allows upholding the statute based on the rationale that the Eighth Amendment does not require the setting of evidentiary standards.

III.

PSYCHIATRIC EXAMINATION

This issue, as the previous one, as drafted in the pretrial order is purely a factual issue. The record indicates that the sentencing court did not conduct its own independent psychiatric examination. The issue, as drafted, may be an attempt to state an issue that Holtan was denied due process because the trial court did not order a psychiatric examination on its own motion, prior to accepting the guilty plea.

A trial court must order a competency hearing sua sponte when there is substantial evidence before it raising a bona fide doubt as to the defendant's competency. *Crenshaw v. Wolff*, 504 F. 2d 377, 378-379 (C. A. 8th Cir. 1974), cert. denied, 420 U.S. 966 (1975). The present case

closely parallels the facts in *Evans v. Swenson*, 371 F. Supp. 1101 (U. S. D. C. E. D. Mo. 1974), wherein the defendant had a long history of incidents indicating that he was disturbed. There was evidence in *Evans* that the defendant was competent at the time of trial. 371 F. Supp. at 1104. Holtan was examined by a psychiatrist five or six weeks before pleading to the charges. The psychiatrist's conclusion at that time was that Holtan was sane and demonstrated no inability to assist his attorney in preparing a defense. This conclusion is buttressed by Carey's testimony that Holtan appeared very intelligent and lucid during the entire period of his representation. Although there may have been past episodes where Holtan was not legally sane, all indications point to his sanity at the time of the no contest plea. Accordingly, the evidence does not present a bona fide doubt as to the petitioner's competency.

IV.

THREE-JUDGE PANEL

The petitioner challenges the constitutionality of §§ 29-2520 and 2521, R. R. S. Neb., because they do not provide criteria for the invocation of a three-judge panel and do not specify the procedure to be followed when such a panel is convened. Section 29-2520 is not totally devoid of criteria upon which to invoke a three-judge panel. In the case of the disability or disqualification of the district judge who presided at trial, the Chief Justice of the Supreme Court of Nebraska must convene a three-judge sentencing panel. The disability or disqualification of the trial judge thus acts as one criterion for invoking the sentencing panel. In all other cases—as with the present

case—the statute sets forth no criteria for invocation of the sentencing panel and there are no court rules or case law providing any. This lack of criteria leads the petitioner to challenge the statute as unconstitutionally vague and a violation of equal protection.

The briefs of counsel miss the thrust of the test under the due process clause. Both counsel assert that the law should be tested for vagueness, based on whether persons of normal intelligence would necessarily differ as to the statute's application. Such a test is applicable when a substantive prohibition on conduct is being challenged. See *Grayned v. City of Rockford*, 408 U. S. 104, 108, and n. 3 (1972). Such a limitation is designed to ensure that persons governed have fair warning of what the law expects of them. The calling of a three-judge sentencing panel and its conduct are not akin to a substantive prohibition.

The validity of §§ 28-2520 and 2521 under the due process clause rests on whether they guarantee a fundamentally fair sentencing procedure. The petitioner has not demonstrated that the mere invocation of a three-judge panel presents any lack of fairness. Except in situations where the judge is prejudiced, the litigants have no right to have a particular judge or judges preside. See *United States v. Baker*, 441 F. Supp. 612, 615 (U. S. D. C. M. D. Tenn. 1977), and cases cited therein. Holtan has made no showing of prejudice, so his claim that the invocation of a three-judge panel violated his due process rights is without merit.

The lack of procedural rules for the conduct of the sentencing proceeding must be considered in light of the

federal courts' reluctance to "establish procedural rules for the States, except where mandated by the Constitution." *Barker v. Wingo*, 407 U. S. 514, 523 (1972). The constitutional mandate of the Eighth Amendment provides a possible source of procedural rules. Of primary concern is the possibility that death is being inflicted in a manner to permit "this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U. S. 238, 309-310 (1972) (Stewert, J., concurring).

The petitioner has not demonstrated that the lack of procedures in his case resulted in an arbitrary imposition of the sentence. The application of the aggravating and mitigating circumstances and the procedure to obtain evidence bearing on them have all the indicia of a fair proceeding. The sentencing panel did not prejudice Holtan by excluding relevant evidence and apparently reached a unanimous decision to impose the death penalty. The Supreme Court of Nebraska reviewed the sentencing panel's determination pursuant to §§ 29-2524 and 2525, R. R. S. Neb. (Supp. 1973), ensuring that the factors were applied uniformly and avoiding improper imposition of the sentence. See *State v. Holtan*, 197 Neb. 544, 250 N. W. 2d 876 (1977). That court's opinion contains no indications of an arbitrary decision.

The petitioner has stated in his brief a number of hypotheticals possibly constituting a freakish and wanton application of the penalty. His case has not presented this court with such an instance. The guaranteed appellate review of the sentences removes the danger of arbitrariness that would make the statute run afoul of the Eighth Amendment. See *Gregg v. Georgia*, 428 U. S. 153, 204-207 (1976) (plurality opinion). The Nebraska appel-

late process in effect at the time, while not identical to Georgia's, would seem to net the same results of consistent application of the law. Compare *State v. Rust*, 197 Neb. 528, 250 N. W. 2d 867 (1977), with *State v. Simants*, 197 Neb. 549, 250 N. W. 2d 881 (1977), with *State v. Stewart*, 197 Neb. 497, 250 N. W. 2d 849 (1977). Since Holtan's sentencing, Nebraska has adopted a comparison procedure similar to the one upheld in *Gregg v. Georgia*, supra. See L. B. 711, 1978 Nebraska Laws 621.

Insofar as the hypotheticals are not meant to challenge the statute on its face but as applied, they present situations not in this case and they will not be addressed, because they invite an advisory opinion. See *Poe v. Ullman*, 367 U. S. 497, 509 (1961) (Brennan, J., concurring).

The statutes are also challenged as a violation of equal protection. The basis of this challenge lies in the assertion that the statute is being inconsistently applied. The preceding discussion disposes of that allegation.

V.

JURY INPUT IN SENTENCING

The petitioner asserts that the sentencing procedure under § 29-2520, R. R. S. Neb., is unconstitutional, because it violates his right to a jury trial secured by the Sixth Amendment. Nebraska is one of eight states using a judge as the final decisionmaker, rather than a jury, in the capital sentencing determination. See Gillers, "Deciding Who Dies," 129 U. Pa. L. Rev. 1, 17, n. 77 (1980).

The issue of jury sentencing's being mandated by the Constitution has nearly escaped reasoned consideration by the Supreme Court of the United States in the large

number of cases concerning the death penalty. In *Witherspoon v. Illinois*, 391 U. S. 510, 519, n. 15 (1968), the court noted that jury involvement in sentencing performs a valuable function by maintaining a link between community values and the punishment imposed. The plurality in *Proffitt v. Florida*, 428 U. S. 242, 252 (1976), stated that "it has never [been] suggested that jury sentencing is constitutionally required." The statement is dicta only, because the factors used and not the identity of the sentencer were in issue in *Proffitt*. Justice Rehnquist has addressed the issue twice. First, in his dissent to *Lockett v. Ohio*, 438 U. S. 586 (1978), he summarily dismissed a contention that jury sentencing is constitutionally required. In *Richmond v. Arizona*, 434 U. S. 1323, 1325 (1977), in an opinion denying a stay of execution, Justice Rehnquist, in his capacity as a circuit justice, again summarily dismissed the argument.

A sentencing determination necessarily involves consideration of at least three factors: retribution, deterrence, and rehabilitation. The retribution factor involves an expression of society's outrage at the crime. The goal served by retributive notions is to channel punishment decisions into the legal system and preserve some form of ordered society. See *Gregg v. Georgia*, 428 U. S. 153, 183 (1977) (plurality opinion). In order to satisfy retributive notions, some degree of proportionality between the crime and the punishment must exist. *Id.*, at 183-184.

The deterrence factor contains two subparts: specific deterrence and general deterrence. The former looks to the individual and seeks to incapacitate or discourage him from committing further crime. A sentence of death,

if carried out, operates to incapacitate the individual totally; life imprisonment incapacitates only for the length of incarceration, should it be shorter than the individual's natural lifetime, and only to the extent that the individual does not commit further crimes while in prison. General deterrence looks to the population of potential criminals and the effect a particular sentence is likely to have on potential criminal criminals. Whether the potential of death has a stronger deterrent effect than life imprisonment is a subject of considerable dispute. See e. g., *Furman v. Georgia*, supra, 408 U. S. at 345-354.

A third consideration in sentencing is the rehabilitative prospects of the convicted individual. A sentence of death extinguishes any possibility of rehabilitation, whereas life imprisonment acknowledges some potential for becoming a functional part of society at a future date.

The aggravating and mitigating factors in § 29-2523, R. R. S. Neb. bear on all three of the considerations for sentencing.

The argument for not requiring a jury to be involved in the sentencing is twofold. First, judges have traditionally been vested with the power to sentence in cases not involving capital punishment. If the right to a jury trial were to extend to sentencing, there is little justification to differentiate between capital crimes and others. Second, judicial sentencing will lead to greater consistency in the imposition of capital punishment. The fears articulated by prior Supreme Court cases that the penalty was being imposed in a wanton and freakish manner are better allayed by having an experienced judge do the sentencing. See *Proffitt v. Florida*, supra, 428 U. S. at 252.

In addition, the experienced judiciary will be better able to apply the principles of retribution, deterrence and rehabilitation, the argument goes.

The reasoning put forth for requiring a jury involves three parts. First, involving jurors in the sentencing decision maintains a link between the imposition of the penalty and "evolving standards of decency that mark the progress of a maturing society." *Witherspoon v. Illinois*, supra, 391 U. S. at 319, n. 15. This link ensures that society's judgment as to the need for retribution is honored. Second, the deterrence and rehabilitation considerations are best left to a jury of the defendant's peers, because those considerations are purely pragmatic ones, drawing upon the collection of life experiences in a jury. And third, the sentencing determination in capital cases involves a factual determination of whether the state has proved its case beyond a reasonable doubt; because factual determinations are traditionally left to the jury, the right to a jury decision would seem to attach.

The arguments for both views have merit. However, the more persuasive view is that jury input in capital sentencing is not constitutionally required. The traditional lack of jury involvement in sentencing generally and the greater likelihood of consistency and fair application of the sentencing standards outweigh the argument in favor of a constitutional requirement of jury involvement. Accordingly, Nebraska's method of using judges rather than a jury to make the sentencing determination in capital cases is constitutional, and the challenge is decided adversely to the petitioner.

V.

METHOD OF EXECUTION

The petitioner's final claim is that Nebraska's method of execution—electrocution—is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

This manner of imposing the death penalty does not violate the Eighth Amendment. Cases holding methods of infliction of death unconstitutional focus on the use of torture or on a lingering death. See *Gregg v. Georgia*, supra, 428 U. S. at 170. Death by electrocution, involving the rapid extinguishment of life, does not fall within the prohibition. *Id.*, 428 U. S. at 178. The petitioner's final claim is without merit.

An order will be entered denying the petition for writ of habeas corpus.

Dated October 19, 1981.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX C

STATE OF NEBRASKA,

Appellee,

vs.

RICHARD D. HOLTAN,

Appellant.

287 N.W. 2d 671

Filed January 15, 1980. No. 42452.

1. *Criminal Law: Death Penalty: Legislature: Time.* No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act.

2. *Criminal Law: Post Conviction.* A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

3. *Criminal Law: Statutes: Aggravating and Mitigating Circumstances.* The trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R.R.S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523.

4. *Criminal Law: Attorney and Client.* Where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.

5. ——: ——. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client.

6. *Criminal Law: Right to Counsel.* If competent counsel, after investigation, considers a point worthless, the fact that he is court appointed does not require him to pursue it. The right to counsel does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit.

7. *Criminal Law: Pleas: Hearings.* The mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court an obligation or duty to require a competency hearing.

Appeal from the District Court for Douglas County: Samuel P. Caniglia, Judge. Affirmed.

J. William Gallup, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

Heard before Krivosha, C.J., Boslaugh, McCown, Clinton, Brodkey, White, and Hastings, JJ.

Per curiam.

This is the second appearance of this case before this court. In the first case, State v. Holtan, 197 Neb. 544, 250 N.W. 2d 876, we affirmed the judgment of the District Court which found the defendant guilty of first degree murder in the perpentration of a robbery and with shooting with intent to kill, wound, or maim. The defendant had entered a plea of nolo contendere to both counts and was sentenced to death on the first court, and to serve 15 to 45 years on the second count. Defendant now appeals from a denial of a motion which sought post con-

viction relief under the provisions of the Post Conviction Act, section 29-3001 et seq., R. R. S. 1943.

By amended motion to vacate, the defendant maintains that his conviction was invalid for a number of reasons which are more particularly set out in the amended motion to vacate. They may, however, be grouped together and will be so discussed herein. They fall into the following general categories: (1) The inadequacy of trial counsel; (2) the failure of the trial court on its own motion to order a psychiatric examination of the defendant prior to accepting the plea to first degree murder; (3) the imposition of the death penalty violates the constitutional rights of the defendant as more particularly set out in various paragraphs of the motion to vacate; (4) Nebraska's death penalty statute is unconstitutional because it does not permit the trial court to consider all mitigating factors concerning the character of the defendant; and (5) the provisions of L. B. 711, Laws 1978, enacted after the imposition of sentence in this case, should be now applied, thereby entitling defendant to be sentenced to life imprisonment.

Taking defendant's claim concerning L. B. 711 first, we can dispose of that quickly. L. B. 711, Laws 1978, was not enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of L. B. 711, it is not affected by the adoption of L. B. 711. No capital case in which a final sentence was imposed prior to the effective date of L. B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act. Moreover, in State v. Holtan, *supra,* we specifically re-

viewed the aggravating and mitigating circumstances in the instant case and concluded that a careful review of the record revealed that the three-judge sentencing panel gave careful consideration to all aggravating and mitigating factors pertaining to the offense and correctly concluded that the aggravating factors considerably outweighed the mitigating factors. We determined that the sentence imposed could not be held to be improper or excessive under the law. We, therefore, reject defendant's contention that the imposition of the death penalty in this case is either unjustified or improper.

With regard to the defendant's several claims concerning the constitutionality of the Nebraska death penalty, we note that the defendant, in his direct appeal to this court, challenged the constitutionality of Nebraska laws pertaining to the death penalty. As noted in the defendant's direct appeal, questions regarding constitutionality have been dealt with by this court in State v. Rust, 197 Neb. 528, 250 N. W. 2d 867, and again in State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. Furthermore, we have frequently held that a motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Weiland, 190 Neb. 111, 206 N. W. 2d 336; State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110; State v. Weiland, 188 Neb. 626, 198 N. W. 2d 327. Defendant's contention in that regard is without merit.

Defendant further maintains that the trial court erred in not considering as a mitigating factor that the defendant had sought to save the life of an inmate while in jail. The record does not reflect the fact that the court did

not consider that issue. The court did receive additional evidence consisting of an exhibit and testimony of a deputy sheriff concerning the incident. The court concluded that the fact was not a mitigating circumstance within the specific provisions of the statutes. With that conclusion we do not disagree. The defendant's argument concerning the statute, section 29-2523, R. R. S. 1943, however, is apparently based upon the decision of the United States Supreme Court in the cases of Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973, and Bell v. Ohio, 438 U. S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010. Defendant claims that section 29-2523 is in violation of the United States Constitution in that it does not permit the court to consider all matters relevant to mitigation as required by both the Lockett and Bell decisions. In this respect, we believe the defendant reads the statute incorrectly. The statute, section 29-2523, sets out specific aggravating and mitigating circumstances. The trial court was correct in concluding that the matter concerning the aiding of the prisoner did not specifically fall within one of the mitigating circumstances. Nevertheless, section 29-2521, R. R. S. 1943, specifically provides that in the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence. The statute further provides, "Any such evidence which the court deems to have probative value may be received." All the sections must be read together. In this case the evidence sought to be introduced by the defendant was received. The court did consider the evidence even though it was not a mitigating circumstance within the meaning of the statute. It concluded that the offered fact was not of such weight as to cause the court to refrain from imposing the death sentence.

The United States Supreme Court in Lockett v. Ohio, *supra,* said: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be *precluded* from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis supplied.) Nothing in our statute precludes the court from considering *all* aspects of the defendant's character. To the extent there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523. Our review of the record satisfies us that indeed the trial court did consider all the evidence, including the fact that the defendant had aided in saving the life of an inmate. Defendant's claim of error, as it pertains to the statute in question, is without merit.

Defendant further maintains that the conviction may not stand because of inadequacy of counsel. Defendant's counsel was appointed by the court and was a member of the Douglas County Public Defender's office. A reading of the record discloses that defendant's claim of inadequacy of counsel is totally without support. We have recently said with regard to determining adequacy of counsel: "'Our present test would be that trial counsel

perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.'" State v. Lang, 202 Neb. 9, 272 N. W. 2d 775. Likewise, we have said that where one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant. See State v. Lang, *supra*.

Defendant maintains that inadequacy of counsel is displayed in a series of ways, one of which was that counsel did not sufficiently consult with the defendant. The record in that regard is totally in conflict. The defendant maintains he saw counsel only five or six times. Counsel, on the other hand, maintains he saw the defendant at least once a week. In either event, defendant does not in any manner show us how, had counsel discussed the matter with defendant any more than he did, anything different would have occurred. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client. See Kress v. United States, 411 F. 2d 16 (8th Cir., 1969). There simply is no evidence to support that claim or to show how or in what manner defendant was prejudiced.

Defendant further maintains that counsel failed to adequately investigate his case and to advise defendant of the facts. It appears there was some evidence to indicate that one of the two surviving victims had difficulty in identifying the defendant. The record, however, conclusively establishes that the other surviving victim fully, accurately, and completely identified the defendant and could identify the defendant at time of trial without difficulty or hesitation. Defendant maintains that had he

known there was a discrepancy between the parties as to his identification, he would not have entered a plea of no contest and would have hoped that the jury would have found him not guilty by reason of the conflict in identification. There is simply no basis to that claim.

The record discloses that court-appointed counsel was of the opinion that if the defendant went to trial and the two surviving victims were called to testify, notwithstanding any minor conflict in identification, the evidence of the nature of the crime would be so overwhelming that the imposition of the death penalty would be a certainty. Hindsight, of course, discloses that entering a plea of no contest did not save the defendant from the maximum penalty. Nevertheless, the record simply does not justify a claim that the defendant was not aware of sufficient facts upon which he could make an intelligent decision with regard to entering a plea. "[I]f competent counsel, after investigation, considers a point worthless, the fact that he is court-appointed does not require him to pursue it. • • • the right to counsel • • • does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. One reason a defendant is given a lawyer is because he is legally ignorant." White v. Hancock, 355 F. 2d 262 (1st Cir., 1966).

Defendant further maintains that counsel was inadequate in that he did not adequately pursue a defense of insanity. The record, however, discloses that counsel not only had the defendant examined by a prominent local psychiatrist but further consulted with psychiatrists in the state of Washington who were familiar with the de-

fendant's condition. That investigation disclosed that while there was evidence of defendant's mental condition, it was not of the type to satisfy the M'Naghten rule followed in this jurisdiction. Even the testimony produced by defendant at the post conviction hearing did not establish grounds upon which the M'Naghten rule could be pursued as a defense. The failure of trial counsel to pursue that defense was not inadequate.

Finally, the defendant maintains that counsel was inadequate in that he did not subpoena witnesses from the state of Washington who would have testified as to his good character. The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.

A full reading of the record discloses that the defendant simply did not have much upon which to base his defense and his counsel, likewise, did not have much with which to work. The record further discloses that before the defendant was permitted to enter a plea, the trial court conducted a textbook-perfect interrogation of the defendant and likewise repeated that interrogation before imposing sentence. Had there been any significant error or inadequacy as suggested by the defendant, the trial court afforded the defendant every opportunity to call that to its attention. The defendant chose not to do so. The defendant would seem to argue that having chosen a specific trial tactic and having failed with that tactic he was inadequately represented. It was a calcu-

lated decision which the defendant intelligently took. It simply did not work as he had hoped it would. That does not create inadequate counsel.

The final point raised by defendant is that he was denied due process because of the trial court's decision not to order a competency hearing on its own motion. While the record discloses that the defendant may very well be suffering from a form of amnesia brought about by his unconscious desire to block out the crime, there is no evidence in the record to suggest that at the time he entered a plea he was not competent and did not understand what was taking place or that he was in fact entering a plea. Having already disposed of the defense of insanity, the mere fact that the defendant maintains he does not recall committing the crime but with full faculty enters a plea does not impose upon the trial court court an obligation or duty to require a competency hearing. The defendant has produced no evidence to disclose that at the time he entered his plea he was not competent to do so. The issue is not whether or not he remembers the commission of the crime, but rather whether he is competent to enter a plea. In that regard, the record clearly establishes that he was so competent. We find that this claim made by defendant is likewise without merit.

For all the reasons set out herein, we find that the defendant has failed to establish any basis for post conviction relief and affirm the judgment of the trial court which denied the defendant any such relief.

Affirmed.

Krivosha, C. J., dissents.

Clinton, J., concurs in result.

APPENDIX D

§ 2254. *State custody; remedies in Federal courts*

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct,

unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.